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No. 95-373

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

RAY HOMESLEY, JAMES A. WAGNER,
W.A. LOUDERMILK, JERRY D. ROE
AND ROBERT J. FARRELL,
Class A Petitioners,

v.

JANICE H. FAULKNER, *et al.*,
Respondents.

Petition for A Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

INTRODUCTION

There is an administrative controversy between these five petitioners and North Carolina tax authorities as to whether petitioners met the procedural requirements of the state refund statute to obtain refund of taxes they paid on their federal pension income pursuant to state tax statutes, now repealed, which differentially taxed state and federal pension income. Such taxation was held unlawful and unconstitutional in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989). Each petitioner claims that he met the statute's requirements and is entitled to his refund,

but that state administrative dalliance in paying the refunds is depriving him of due process. Petitioners ask this Court to establish "a federal constitutional policy" that "'administrative dalliance' is no excuse for failing to comply with the clear mandates of this Court." *Petition*, pp. 6, 10.

The petition seeks to convert an administrative factual dispute, based on a purported misapplication of a state refund statute that has been held to meet federal due process standards, into a new federal constitutional principle. Moreover, the petition is based on information that is inaccurate, and the controversy has been rendered moot due to subsequent developments. The State respondents have administratively reviewed each petitioner's claim, made refunds to three of them who met the refund statute's requirements and denied refunds to the other two, who did not.

There simply is no compelling reason to grant this petition, and it should be denied.

COUNTER STATEMENT OF THE CASE

After *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), North Carolina equalized the tax treatment of State and federal pension income and gave refunds to federal pensioners who met the requirements of the applicable state tax refund statute, N.C. GEN. STAT. § 105-267 ("§ 267").[1] To obtain a refund, § 267 requires a taxpayer

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[1] Years before *Davis*, the Supreme Court of North Carolina held that § 267 was the exclusive method by which a taxpayer can challenge the constitutionality of a state tax statute and obtain a refund of taxes paid under the statute. *Coca-Cola v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977). The state supreme court adhered to its earlier ruling in cases

(continued...)

to pay the disputed tax and protest its legality by demanding a refund within thirty days of payment.

More than 12,000 federal pensioners met § 267's requirements and received over nine million dollars in refunds of taxes paid on their 1988 federal pension income.[2] For those federal pensioners who failed to make timely refund demands because *Davis* was decided so near the filing deadline for the 1988 tax year, the North Carolina General Assembly enacted a special tax credit permitting them to recover over a period of three years the taxes paid on their 1988 federal pension income. N.C. GEN. STAT. § 105-151.20. Thus, all federal pensioners received either a refund or a tax credit for state taxes paid on their 1988 federal pension income.

In April 1989, federal pensioners ("Class A petitioners")[3] sued the North Carolina Department of Revenue

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[1](...continued)
spawned by *Davis*. *Bailey v. North Carolina*, 330 N.C. 227, 235, 412 S.E.2d 295, 300 (1991), *cert. denied*, 504 U.S. 911 (1992); *Swanson v. North Carolina (III)*, 335 N.C. 674, 680, 441 S.E.2d 537, 541, *cert. denied*, 509 U.S. ___, 130 L. Ed. 2d 598 (1994).

[2] By its terms, § 267 limited refunds to the 1988 tax year because claims for prior-year taxes, not having been made within "30 days after payment," were extinguished.

[3] A second class ("Class B"), composed of active duty and reserve members of the federal armed forces who paid North Carolina taxes on their military service pay, was added as plaintiffs in 1990. The Class B plaintiffs sought refunds because they did not receive a tax benefit, now repealed, extended to members of the North Carolina National Guard. They claimed this disparate tax treatment also violated *Davis*. Since none of the petitioners were Class B members, the Class B claims are irrelevant to this petition and not mentioned further in this brief.

and State tax officials ("State respondents") in the United States District Court for the Eastern District of North Carolina. Petitioners sought monetary refunds, as well as declaratory and injunctive relief. In August 1990 the district court dismissed the monetary claims but not claims for purely prospective declaratory and injunctive relief.

In 1990 Class A petitioners sued in state court to obtain refunds. Applying *Davis* prospectively only, the Supreme Court of North Carolina held that petitioners were not entitled to refunds. *Swanson v. North Carolina (I)*, 329 N.C. 576, 407 S.E.2d 791 (1991), *adhered to on rehearing*, *Swanson v. North Carolina (II)*, 330 N.C. 390, 410 S.E.2d 490 (1991). This Court reversed and remanded the *Swanson* decisions for reconsideration in light of *Harper v. Virginia Department of Taxation*, 509 U.S. ___, 125 L. Ed. 2d 74 (1993), in which the Court held that *Davis* must be applied retrospectively. *Swanson v. North Carolina*, 509 U.S. ___, 125 L. Ed. 2d 713 (1993).

On remand, Class A petitioners asked the North Carolina Supreme Court to remand to the trial court for judgment in their favor, or, alternatively, to allow further briefing and argument in the state supreme court in light of the *Harper* decision and the remand order. The North Carolina Supreme Court ordered further briefing and argument rather than remanding to the trial court. While the North Carolina Supreme Court was reconsidering its earlier *Swanson* decisions, Class A petitioners returned to the United States District Court and moved for entry of a final judgment. They unabashedly sought the federal judgment to compel the state supreme court to award refunds by virtue of the preclusive effect they contended the federal judgment

would be given in the pending remand proceeding. In response, the State respondents moved for dismissal of the federal action because there was no longer any purely declaratory or injunctive relief available to them, and, therefore, the Eleventh Amendment barred the relief they sought. *Green v. Mansour*, 474 U.S. 64 (1985); *Edelman v. Jordan*, 415 U.S. 651 (1974). Further, the State respondents asked the district court to reconsider its 1990 refusal to dismiss the action pursuant to the Federal Tax Injunction Act bar.

While these motions were pending, the Supreme Court of North Carolina rendered its decision in *Swanson v. North Carolina ("Swanson III")*, 335 N.C. 674, 441 S.E.2d 537 (1994), and this Court subsequently denied a petition to review that decision. *Swanson v. North Carolina*, 509 U.S. ___, 130 L. Ed. 2d 598 (1994). In *Swanson III*, the state court held that § 267 met all federal due process requirements and had been applied properly to deny petitioners' refund claims for failure to meet its requirements.[4] The district court then granted the State respondents' motion for

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[4] Petitioners cite the state trial court's ruling in *Southminister v. Justus*, ___ N.C. App. ___, 459 S.E.2d 793 (1995), as holding that the Department violated the Due Process Clause of the Fourteenth Amendment based on evidence that the Department's refund policy was not enforced uniformly. *Petition*, p. 9 n. 2. Clearly the unreported decision of a trial court on an issue that was not reached in the state appellate courts is not precedent to cite in this Court. More basically, the *Southminister* decision dealt with refunds of state sales and use taxes for charitable organizations under a different refund statute from the one at issue here. The alleged lack of uniformity came in determining which organizations were charitable or religious organizations exempt from sales and use tax requirements and not with the kinds of procedural aspects about which petitioners complain. *Southminister*, thus, is totally irrelevant to this case, contrary to the suggestion in petitioners' footnote.

summary judgment dismissing petitioners' due process claims because the Full Faith and Credit Act (28 U.S.C. § 1738) required the district court to give preclusive effect to *Swanson III*.

The United States Court of Appeals for the Fourth Circuit affirmed, *Swanson v. Faulkner*, 55 F.3d 956 (4th Cir. 1994), and two petitions for writs of certiorari ensued. The present petition was filed by five individual federal pensioners who claim they met the procedural requirements of § 267 yet were denied refunds of taxes collected on their federal pension income in violation of *Davis*. The other petition, to which the State respondents have separately responded, was filed by the entire class of approximately 100,000 Class A petitioners and addresses the Full Faith and Credit Act issue. (*Swanson v. Faulkner*, No. 95-372).

The individual petitioners' petition is based on the following portion of the Fourth Circuit decision:

> Finally, plaintiffs contend that the district court's final order was overbroad because it ignored those taxpayers who complied with § 267 and still were denied relief. Plaintiffs support this claim with documentation from several taxpayers thus affected. The State responds by admitting that administrative problems have resulted in long delays for some refunds, but adds that these claims now will be promptly reviewed and appropriate action taken. We are influenced in accepting this assurance by our view that such administrative dalliance does not rise to a constitutional level.

Swanson v. Faulkner, 55 F.3d at 966.

Out of the entire class of approximately 100,000 Class A petitioners, only the five named petitioners were identified as having made such claims. The Department of Revenue reviewed each claim and made refunds to petitioners Ray Homesley, James A. Wagner and W.A. Loudermilk. The refund claims of petitioners Jerry D. Roe and Robert J. Farrell were denied. *Affidavit of B.W. Thomas*, Respondents' Appendix, ¶¶ 7 & 8, pp. 3a-4a.[5]

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

There is no compelling reason for allowing the writ of certiorari. The petition centers on factual determinations in the application of a state refund statute that has been held to be in full compliance with federal constitutional law to the facts in petitioners' individual cases, rather than on broad or substantial principles of constitutional law. The facts show that state revenue officials have reviewed the five petitioners'

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[5] Due to the unusual posture of this petition, the State respondents have included the affidavit of B.W. Thomas in their appendix to bring to the Court's attention subsequent relevant developments necessary to present an accurate account of the facts central to this petition, particularly since the developments essentially moot the case. *See Board of License Commissioners of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (counsel has a continuing duty to inform the Court of any developments which may conceivably moot a controversy); and R. STERN, E. GRESSMAN, ET AL., SUPREME COURT PRACTICE § 13.11(k)(3), p. 557 (7th ed. 1993) (important factual or legal developments occurring after the decision below was rendered should be brought to the Court's attention if the development may change the status of the case or the need for the Court to resolve the questions raised). It appears that petitioners have also done the same by including, without explanation, excerpts from depositions of B.W. Thomas and Keith F. McCombs in Appendix G to their petition. These depositions were taken in February 1995 in another lawsuit and were not in the record before the district court or the Court of Appeals.

individual claims and given full refunds to the three who qualified for refunds and denied the claims of the two who did not. There was no attempt to violate petitioner's rights through "administrative dalliance," nor is there any need to establish a new federal constitutional policy, as petitioners request.

During the *Swanson* litigation, State tax authorities believed that all federal pensioners who met the requirements of § 267 received refunds for taxes paid on their 1988 federal pension income, the only year for which the State believed it owed refunds.[6] In contrast, Class A petitioners claimed entitlement to refunds for tax years 1985-88. Thus, there was a controversy as to how many years of tax refunds were at issue, and that controversy was not litigated to finality until *Swanson III* was decided and this Court declined to review that decision by writ of certiorari in December 1994. With that controversy decided, petitioners were able to point to only five cases out of approximately 100,000 retirees who comprise the Class A petitioners in which there was a colorable claim that refunds for tax year 1988 were denied despite compliance with the refund statute's requirements.

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[6] Petitioners' refund claims are limited to taxes paid on their 1988 federal pension income and cannot include previous years. Failure to protest within thirty days after paying the tax due for any year extinguishes a refund claim for that year. By the express words of § 267, a protest in later years cannot revive an extinguished claim since the belated protest would not come within "30 days after payment" of "the tax paid" in the earlier year. Therefore, if a federal retiree in 1989 timely protested the payment of state tax on his 1988 pension income, his cause of action would be limited to a refund of 1988 taxes, and he would have a three-year limitations period within which to file his action to recover a refund for that year if his demand was not honored.

Based on review of these petitioners' claims, refund checks were sent in February 1995 to plaintiffs' counsel for delivery to petitioners Ray Homesley and James A. Wagner. After additional review, the Department of Revenue concluded that W.A. Loudermilk was also entitled to a refund, and a check was mailed to him on September 12, 1995. *Affidavit of B.W. Thomas*, Respondents' Appendix, ¶¶ 4-6, pp. 2a-3a.

Petitioners' counsel admit that they received the Homesley and Wagner checks but say the checks were not cashed on the ground that it would have been inappropriate to cash them since Homesley and Wagner were both class representatives. *Petition*, p. 6 n. 1. Moreover, petitioners' counsel state they are unwilling to advise their clients to accept refund checks without court approval -- a difficult task since the state refund action has ended in a final judgment against them -- or until this Court rules on their petition. *Id.*

The refund claims of petitioners Robert Farrell and Jerry Roe were denied because neither met the requirements of § 267.[7] Petitioner Farrell filed a 1988 tax return dated February 14, 1989. In his affidavit, he claimed that despite its February date the return was actually filed on April 11, 1989. *Farrell Affidavit*, Petition, Appendix A-109. However, the Department of Revenue issued Farrell a refund check on March 21, 1989 in the amount of $516.00 -- the exact dollar amount he claimed was due on the February return -- which he cashed on March 27, 1989. The Department of Revenue rationally concluded that since the refund check was

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[7] In *Bailey v. North Carolina*, 330 N.C. at 236, 412 S.E.2d at 301 (1991), the North Carolina Supreme Court held that the taxpayer has the burden of proving entitlement to a refund under § 267.

issued in March Farrell could not have filed his tax return on April 11th as he claimed and that the refund demand was not timely made. *Affidavit of B.W. Thomas*, Respondents' Appendix, ¶ 8, p. 4a. Thus, the Department had good cause to deny Farrell's refund claim.

Petitioner Jerry Roe filed a 1988 tax return dated February 11, 1989, and subsequently received a refund. His claim is based on a photocopy of an amended tax return, dated February 28, 1989, that he claims to have filed. The Department of Revenue has no record of ever having received it, although it did receive virtually identical amended returns dated April 14 and May 30, 1989 (both beyond the statute's 30-day demand period). He explained on the purported February 28th amended return that he was excluding his federal pension income because "Davis vs Michigan unconstitutional to tax federal and not state employees." (*sic*). However, on February 28, 1989, the only *Davis* decision was that of the Michigan Court of Appeals which upheld the disparate taxation of state and federal pension income, and this Court's decision in *Davis* followed one month later on March 28, 1989. Thus, the Department of Revenue had good cause to conclude that Roe's February 28th amended return had not been filed as he claimed and to deny his refund claim because his subsequent refund demands were not timely made. *Affidavit of B.W. Thomas*, Respondents' Appendix, ¶ 7, pp. 3a-4a.

In sum, the State respondents are not withholding tax refunds of taxes collected in violation of *Davis* from federal pensioners who met § 267's requirements, and there is no merit to petitioners' contention that their due process rights have been violated due to state tax officials' "administrative dalliance."

CONCLUSION

There is no compelling reason to grant the petition for writ of certiorari, and it should be denied.

Respectfully submitted,

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In The
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Affidavit of B. W. Thomas

B.W. THOMAS, after being duly sworn, deposes and says:

1. I am the Director of the Office Examination Division of the North Carolina Department of Revenue, where I have been employed for 33 years. I am familiar with the North Carolina Revenue Laws and with the Department's records concerning income tax refund claims filed by retired federal employees following this Court's decision in *Davis v. Michigan Department of Treasury*. My responsibilities include examination of tax returns to determine whether refunds should be made to taxpayers claiming them.

2. In August 1994 I received copies of the affidavits of Ray N. Homesley, James Wagner, William A. Loudermilk, Jerry D. Roe and Robert J. Farrell in which

each claimed that he had made a timely demand, pursuant to N.C. Gen. Stat. § 105-267 ("§ 267"), but had not received a refund of taxes paid on his 1988 federal pension income.

3. After receiving the affidavits, I examined the Department's records to determine whether any of them had been denied a refund despite compliance with § 267's requirements. I concluded that Homesley, Wagner and Loudermilk complied with § 267's requirements and each was sent a refund check. However, I concluded that Roe and Farrell had not made timely refund demands and were not entitled to refunds.

4. Ray N. Homesley was initially denied a refund because his original return was dated February 15, 1989 and his written demand letter was dated April 17, 1989. Since the demand letter was dated more than 30 days after the original return, the Department presumed that the demand was untimely. However, he later produced a copy of his tax payment check, dated April 3, 1989, which the Department deposited on April 4, 1989. Thus, I concluded that the refund demand had been made within 30 days of payment of the tax, and Homesley's refund demand was timely. In computing the amount of his refund, I offset the amount of the credit he had taken on his 1990, 1991 and 1992 income tax pursuant to N.C. Gen. Stat. § 105-151.20, and I added interest to the date of the refund. Homesley was sent a refund check in the amount of $471.28 on or about February 23, 1995.

5. James Wagner was initially denied a refund because his 1988 return was dated March 9, 1989 and his refund demand (an amended return) was dated April 29, 1989 -- more than 30 days later. He later produced a copy of his tax payment check, dated April 12, 1989. Thus, I concluded that the refund demand had been made within 30 days of payment of the tax, and Wagner's refund demand was timely. In computing the amount of his refund, I offset

the amount of the credit he had taken on his 1990, 1991 and 1992 income tax pursuant to N.C. Gen. Stat. § 105-151.20, and I added interest to the date of the refund. Wagner was sent a refund check in the amount of $131.10 on or about February 23, 1995.

6. William A. Loudermilk was initially denied a refund because his 1988 return was dated February 23, 1989, and his refund demand (an amended return) was dated April 28, 1989 -- more than 30 days later. After a diligent search, the Department found records which showed that on April 10, 1989 it had processed a tax payment check from Loudermilk dated April 1, 1989. Thus, I concluded that the refund demand had been made within 30 days of payment of the tax, and Wagner's refund demand was timely. In computing the amount of his refund, I offset the amount of the credit he had taken on his 1990, 1991 and 1992 income tax pursuant to N.C. Gen. Stat. § 105-151.20, and I added interest to the date of the refund. Loudermilk was sent a refund check in the amount of $197.12 on or about September 12, 1995.

7. After reviewing the affidavit of Jerry D. Roe and the Department's records, I concluded that he failed to establish that he was entitled to a refund because his refund demand was not timely. Roe's original 1988 tax return was dated February 11, 1989. The Department received refund demands in the form of amended return dated April 14 and May 30, 1989. Attached to Roe's affidavit was a purported amended return, dated February 28, 1989, which the Department has no record of ever receiving. He explained on the purported February 28th amended return that he was excluding his federal pension income because "Davis vs Michigan unconstitutional to tax federal and not state employees." He stated in the affidavit that he learned of the *Davis* decision from a Michigan friend who was passing through North Carolina. However, on February 28, 1989, the differential taxation of state and federal pension income

had not yet been declared unconstitutional and the only *Davis* decision was that of the Michigan Court of Appeals which upheld the disparate taxation of state and federal pension income. *Davis* was not decided until a month later on March 28, 1989. Since more than 30 days elapsed between the February 11th return and the April 14th demand, I concluded that he had not made a timely refund demand and was not entitled to a refund.

8. After reviewing the affidavit of Robert J. Farrell and the Department's records, I concluded that he failed to establish that he was entitled to a refund because his refund demand was not timely. Farrell filed a 1988 tax return dated February 14, 1989 which showed that he was due a refund of $516.00, and the Department of Revenue issued Farrell a refund check on March 21, 1989 in the amount of $516.00, which he cashed on March 27, 1989. In his affidavit, Farrell claimed that despite its February date the return was actually filed on April 11, 1989, and that he had filed an amended return even earlier on April 4, 1989. However, I concluded that the date of the refund check the Department sent in March was consistent with the filing of his tax return on February 14th but inconsistent with his claim to have filed his return in April since the Department would not have sent Farrell a refund check before Farrell claims he filed his tax return. Since more than 30 days elapsed between the February 14, 1989 filing and the April 4, 1989 amended return, I concluded that he had not made a timely refund demand and was not entitled to a refund.

This is the 29 day of September 1995.

B. W. Thomas
B. W. THOMAS

Sworn and subscribed to before me,
this the 29th day of September, 1995.

Beverly D. Gardner
NOTARY PUBLIC

My Commission Expires: 5-20-97

BEVERLY D. GARDNER
NOTARY
***
PUBLIC
WAKE COUNTY, N.C.